Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park, PETITIONERS

v.

T. A. WYNER, GEORGE SIMON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents T.A. Wyner and George Simon filed a civil action against the manager of a Florida State Park and the head of the Florida Department of Environmental Protection challenging a regulation imposing minimum clothing requirements in Florida's State Parks, which prevented Respondents from performing annual plays and political performances in the nude at the park. On February 13, 2003, less than twenty four hours later, the district court held an emergency hearing, at which the district court entered a preliminary injunction prohibiting the Petitioners from arresting or interfering with Respondent's performance. Thereafter, after a hearing on the merits, Respondents lost their claim for a permanent injunction and other relief. The district court determined that Respondents were prevailing parties because of the preliminary injunction, and awarded Respondents attorney's fees and costs. Petitioners appealed the finding of prevailing party status and the award of attorney's fees. The Eleventh Circuit Court of Appeals affirmed in *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App. 1a)
The question presented is:

Whether the 11th Circuit decision in *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App.1a) is correct in holding that a preliminary injunction is relief on the merits, or whether the Fourth Circuit decision in *Smyth v. Rivero*, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002), is correct in holding that a preliminary injunction is not a ruling on the merits and thus cannot be the basis for prevailing party status?

Whether the Eleventh Circuit in *Wyner v. Struhs*,

179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11(Fla.). (App. 1a) was incorrect in affirming the district court's order finding that Respondents are prevailing parties where their request for permanent injunctive relief was denied, although at an abbreviated hearing Respondents were awarded interim relief?

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PETITION FOR A WRIT OF CERTIORARI

David B. Struhs, in his official capacity as Secretary, Florida Department of Environmental Protection, and Terrence Coulliette, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park, respectfully petition that a Writ of Certiorari be issued to review the judgment of the Untied States Court of Appeals for the Eleventh Circuit entered on April 25, 2006, in order to resolve a conflict between the Eleventh Circuit, which holds that a party who is successful only at the preliminary injunction stage can be a prevailing party, and the Fourth Circuit's decision in Smyth v. Rivero, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002) which holds that a obtaining a preliminary injunction cannot be the basis for prevailing party status and an award of attorneys fees under a fee shifting statute. The Court is squarely presented with a holding that a preliminary injunction alone, despite an adverse ruling on a permanent injunction, can satisfy the requirement for a ruling on the merits, and the court should reverse the 11th Circuit's decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is dated April 25, 2006, and it is not published in the Federal Reporter, but is published at *Wyner v. Struhs*, 179 Fed.Appx. 566, 2006 WL 1071850 (C.A.11 (Fla.)). (App.1a) The order granting the preliminary injunction of District Judge Donald Middlebrooks, United States District Court for the Southern District of Florida, *Wyner v. Struhs*, 254

F.Supp.2d 1297, is dated February 27, 2003. (App.9a) The opinion of Judge Middlebrooks granting Defendants Motions for Summary Judgment, and finding plaintiffs are partially prevailing parties, is unreported. (App. 23a)

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 25, 2006. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on July 17, 2006. (App. 49a) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

The civil action was filed under the Civil Rights Act, 42 U.S.C. 1983, *et seq.* 42 U.S.C. §1988 provides in pertinent part: "In any action or proceeding to enforce a provision of section ...1983 [among other provisions], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs..." 42 U.S.C.A.§ 1988(b).

STATEMENT

This case has a long history arising out of Respondent's desire to appear nude in the John D. MacArthur Beach State Park in Palm Beach County, Florida. Florida Administrative Code Section 62D-

2.014(7)(b)[1], the "Bathing Suit Rule," provides that patrons in all areas of Florida's State Parks must at a minimum wear a thong and, if female, the equivalent of a bikini top. (App.9a) This suit arose when Petitioners informed Respondents that they would enforce the bathing suit rule and Respondents would not be allowed to perform nude plays and demonstrations at John D. MacArthur Beach State Park. Respondents brought suit arguing that nudity is inextricably entwined in their expressive activity, and thus, application of the bathing suit rule to their nude plays and demonstrations violates their Constitutional Rights. (App. 9a)

Prior to becoming a State Park, the beach in question was used by some to sunbathe nude. Since the site has been operated as a State Park, the State has enforced the rules applicable to all of Florida's State Parks, which are contained in Florida Administrative Code Section 62-D. The rule includes Section 62D-2.014(7)(b), the "Bathing Suit Rule", pursuant to which patrons of the park are required to wear minimum clothing, i.e., a bathing suit.

One of the Respondents in the underlying case, T.A. Wyner, has performed in and produced annual performances of a play, in which some performers are nude, depicting the history of the park and dramatizing the State's enforcement of the minimum clothing

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[1] Florida Administrative Code Section 62D-2.014(7)(b), the "Bathing Suit Rule", provides: In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

requirement. (App.9a) The play took place on a recurring basis after Respondent agreed to perform behind a cloth screen shielding park patrons who did not wish to be exposed to nudity. (App.9a) On at least one occasion, the nude participants did not remain behind the screen. (App.23a)

In 2001, Respondent requested that she be allowed to produce the play in the nude, and the attorneys for the State indicated that she could no longer perform in the nude at the park. In 2003, Respondent requested that she be allowed to produce a nude peace symbol at the park. On February 6, 2003, the park manager responded that she could not produce the peace symbol in the nude. (App.9a)

On February 12, 2003, Respondents filed a Complaint in the United States District Court for the Southern District of Florida, seeking relief in the form of a preliminary injunction preventing the Petitioners from interfering with the nude peace symbol two days later on February 14, 2003. The Complaint also sought declaratory relief, injunctive relief prohibiting interference with future expressive activities that may include non-erotic displays of nude human bodies; and compensatory and punitive damages. The one-count Complaint alleged that the Park Manager's denial of the request violated Respondents' Constitutional Rights under the First and Fourteenth Amendments. (App. 9a)

On February 13, 2003, less than 24 hours prior to the scheduled production, and one day after the Complaint was filed, a hearing was held in the district court on the preliminary injunction. The district court acknowledged the very short notice for the hearing. In-house counsel for the Petitioners appeared by telephone. At that hearing, the Court heard live

testimony from Respondent Wyner, and testimony by telephone from a State employee. After the hearing, the Court entered an Order granting Respondents' request for a preliminary injunction. (App.9a)

At the hearing on the preliminary injunction, the district court assumed content neutrality and applied the *O'Brien* test, first enunciated in *United States v. O'Brien*, 391 U.S. 367, 888 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The district court found that the total ban on nudity restricted more speech than necessary because there were less restrictive means to protect the State's interest in keeping the beach open to all patrons. The district court explained that nude performances had taken place at the park behind the screen, which was evidence of less restrictive means. (App. 9a)

The next morning, the production took place, without interference from Petitioners. As in the past, Respondent and the nude participants performed the peace symbol outside the confines of the screen. (App. 23a)

Subsequently, the case proceeded on Respondents' single-count Complaint, which requested a permanent injunction, declaratory relief and damages on both as applied and facial constitutional challenges to Florida Administrative Code Section 62D-2.014(18)[2],

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[2] Florida Administrative Code Section 62D-2.014(18), the "Free Speech Activities Rule" provides:

> Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech

the "Free Speech Activities Rule", and 62D-2.014(7)(b), the "Bathing Suit Rule." Petitioners and Respondents filed Motions for Summary Judgment. After a hearing on the motions for summary judgment, the district court denied the Respondents' request for a permanent injunction, and denied all other relief to respondents, and granted summary judgment in favor of Petitioners as to all of Respondents claims. (App.23a) In reaching the decision not to enter a permanent injunction, the district court appied the *O'Brien* test again, and found that there were no less restrictive means than a total ban on nudity. The district court indicated that Respondent could no longer perform in the nude at the State park. (App. 23a)

Despite this ruling on the merits in Petitioner's favor, the district court found that the Respondents were prevailing parties, because they prevailed at the preliminary injunction stage, and awarded attorneys fees to Respondents.

Subsequently, Petitioners filed an appeal to the United States Court of Appeals for the Eleventh Circuit challenging the district court's finding that the Respondents are prevailing parties, the award of attorneys' fees, the award of a preliminary injunction, and the finding that the as applied challenge, on which the district court ruled at the preliminary injunction stage of the proceedings, was moot. (App.1a) The Eleventh Circuit affirmed the district court's award of

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activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity.

fees, finding also that Respondents were prevailing parties, because the ruling on the preliminary injunction was a ruling on the merits. Acknowledging that the standards for permanent and preliminary injunctions differ, the Eleventh Circuit Court of Appeals explained that although the Respondents "were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative." (App. 1a)

A timely Petition for Rehearing and Petition for Rehearing En Banc was also denied. (App. 49a) This Court should now consider the Petitioner's claim that the Respondents are not prevailing parties in light of the conflict between the Eleventh Circuit Court of Appeals, which found in this case that a preliminary injunction affords prevailing party status, and the Fourth Circuit's decision in *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2001), *certiorari denied by* 537 U.S. 825 (2002), which holds that a preliminary injunction is not a ruling on the merits can cannot establish prevailing party status. The Court is now presented with the opportunity to reverse the Eleventh Circuit's opinion that preliminary injunctive relief equates to a ruling on the merits.

REASONS FOR GRANTING THE PETITION

A. The Eleventh Circuit Court of Appeals' decision in *Wyner v. Struhs* is in conflict with the Fourth Circuit Court of Appeals' decision in *Smyth v. Rivero*

There is disagreement amongst the Circuit Courts of Appeal on whether a party who wins only preliminary injunctive relief is a prevailing party for purposes of an award of attorney's fees under fee-shifting statutes. The Fourth Circuit Court of Appeals in *Smyth v. Rivero*, 282 F.2d 268 (4th Cir. 2002), *certiorari denied by* 537 U.S. 825 (2002), held that a preliminary injunction cannot form the basis of prevailing party status to support an award for attorneys' fees. In contrast, the Eleventh Circuit Court of Appeals in this case, and the D.C. Circuit Court of Appeals in *Select Milk Producers v. Johanns*, 400 F.3d 939 (D.C.Cir.2005), as well as other Circuit Courts of Appeals, have held that such preliminary relief can afford prevailing party status.

In *Smyth v. Rivero*, *id.*, the Fourth Circuit Court of Appeals held that the preliminary injunction in question could not meet the prerequisite for prevailing party status under 42 U.S.C. §1988. Moreover, the court explained that "[t]he preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination regardless of how it is formulated." *Id.*, p 277, ftnt. 8.

In that case, several recipients of the Aid to Families with Dependent Children (AFDC) program,

challenged a new policy enforced by the Virginia Department of Social Services which required an applicant to identify the father of the child for whom benefits were sought, or to list the first and last names of all individuals who might be the father. The plaintiff applicants were unable to identify the fathers of their children, and as a result of their inability to "cooperate" by identifying the fathers, their benefits under the AFDC program were reduced or eliminated. The applicants brought suit seeking temporary restraining orders, among other relief. The district court entered a preliminary injunction barring the State from enforcing the paternity identification policy against the plaintiffs, so that they continued to receive their benefits. In its order granting the preliminary injunction, the district court found that the plaintiffs were likely to succeed on the merits and the balance of harms favored the plaintiffs.

Thereafter, the Federal government changed its regulation, relaxing the standard for waiver of the identification of the father by the applicant. In addition, the new policy was modified so that it was prospective only, and thus no longer applied to the plaintiffs. The district court dismissed plaintiffs' claims as moot. The parties reached a settlement agreement with regard only to the Department's agreement not to seek repayment of benefits paid to plaintiffs prior to the modification of the policy.

Plaintiffs filed a motion for attorney's fees and costs, which was granted. The district court found that because the plaintiffs obtained a preliminary injunction and a partial settlement, they had prevailed, and were entitled to attorney's fees. The district court awarded the plaintiff nearly $200,000 in fees, and the State appealed the award of fees.

The appellate court found that "[w]hile granting such an injunction does involve an inquiry into the merits of a party's claim, ... the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Id.* at 276. Examining the requisite standard for granting a preliminary injunction, the court explained that a party is not required to succeed on the merits of their claim at that stage. "The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Id.*, at 276.

The Fourth Circuit Court of Appeals reasoned that to prevail at the preliminary injunction stage, a plaintiff must only demonstrate a strong showing or a substantial likelihood of success by clear and convincing evidence to obtain relief. *Id.*, at 276. In addition, in the preliminary injunction context, the court is required to weigh other factors in addition to the merits inquiry, that is, irreparable harm to the plaintiff, public policy considerations, and the balance of harm to plaintiff weighed against harm to defendants. The Fourth Circuit Court of Appeals held that the

> "interplay of these equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[ ] on the merits' or something akin to one for prevailing party purposes."

Id., at 277, *citing Buckhannon*, 121 S.Ct. at 1840.

The decision in *Smyth v. Rivero* comports with this Court's decision in *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). In that case, the State of Texas appealed a preliminary injunction directing it to procure and compensate a qualified interpreter to assist a deaf graduate student. The Court of Appeals for the Fifth Circuit affirmed the preliminary injunction. Although not part of the holding in the case, the Court's discussion of preliminary injunctions is instructive. The Court explained that Fed. R.Civ. P. 65(a)(2), governs preliminary injunctions, and provides that the finding of fact and conclusions of law made by a court granting a preliminary injunction are not binding at a trial on the merits. *Id.*, 451 U.S. at 395, 101 S.Ct. at 1834. Moreover, the purpose of the preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Id.*

> "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party is thus not required to prove his case in full at a preliminary injunction hearing."

Id., 451 U.S. at 395, 101 S.Ct. at 1834, *citations omitted.*

When an expedited decision on the merits is appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a process by which the court can combine a hearing on the preliminary injunction and a trial, which requires at a minimum explicit notice that

the court intends to consolidate the hearing and the trial in order to afford the parties the full opportunity to present their respective cases. See *Rule 65 (a)(2) of the Federal Rules of Civil Procedure.* "In short, where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the merits of the controversy." *Id.* 451 U.S. at 396, 101 S.Ct. at 1834.

The Fourth Circuit Court of Appeals recognized the limitations inherent in a decision to grant a preliminary injunction, and held that accordingly, success at the preliminary injunction stage is not success on the merits. This rationale comports with this Court's opinion above.

The Fourth Circuit's analysis is also consistent with this Court's opinion in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The opinion in *Buckhannon* provided guidance on the issue of preliminary injunctions and prevailing party status. *Buckhannon* dealt with whether or not the catalyst theory adopted by the Circuit Courts of Appeals with the exception of the Fourth Circuit was valid. The decision in *Buckhannon* held that the catalyst theory was an invalid basis for an award of fees, and that the prevailing party must be awarded a judgment on the merits, or to have obtained a court-ordered consent decree. *Id.*, at 604, 1840. Thus, this Court rejected the catalyst theory at least in part because it allowed recovery of fees without a demonstration of success on the merits.

As *Buckhannon* made clear, a prevailing party must have obtained a change in the legal relationship of the parties, and must have obtained relief on the merits. *Id.* Although an award of nominal damages may suffice, there have been no fees awarded where the reversal of the directed verdict or a judicial pronouncement that the defendant violated the constitution unaccompanied by judicial relief. *Id.*, at 1840, 605. The *Buckhannon* majority explained that prevailing party status is appropriate only where a party has obtained a judgment on the merits, or a court ordered consent decree. The Court did not include preliminary injunctions in the discussion of judicial recognition sufficient for entitlement to fees. Thus, *Buckhannon* infers that preliminary relief based on a likelihood of success on the merits is insufficient to establish prevailing party status.

In addition, the *Buckhannon* court expressly refused to abrogate the merit requirement of prior cases.

> "While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the 'merit' requirement of our prior cases and award attorney's fees where the plaintiff's claim 'was at least colorable' and 'not...groundless'. ...We cannot agree that the term 'prevailing party' authorized federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief."

Id., at 606, 1841 (citations omitted.) Therefore, although this Court did not reach the question of whether preliminary injunctive relief can qualify as relief on the merits, the decision in *Buckhannon* indicates that preliminary relief based on a prediction of success on the merits does not suffice.

The Fourth Circuit Court of Appeals' opinion in *Smyth v. Rivero* recognizes the limitations on the inquiry conducted to establish entitlement to a preliminary injunction, and correctly finds that such limited inquiry is not sufficient to establish that plaintiff has obtained relief on the merits. However, the Eleventh Circuit's decision in *Wyner v. Struhs*, (App.1a) and the other Circuit Courts of Appeal disagree, and hold instead that preliminary injunctive relief is relief on the merits for purposes of evaluating prevailing party status.

B. The Eleventh Circuit's decision in *Wyner v. Struhs*.

In *Wyner v. Struhs*, the instant case, the district court awarded fees to a party who won at the preliminary injunction stage, but lost at the permanent injunction stage. *Id.*, at 567. The court found that the order granting the preliminary relief afforded Respondents prevailing party status, and that she was thus entitled to attorneys fees.

The appellate court affirmed the district court's opinion, and determined that the court had awarded the preliminary injunction on the merits. Although the district court denied plaintiff's permanent relief, the Eleventh Circuit found that the award of attorney's fees was proper. *Id.* In its decision, the appellate court explained why the district court could conduct the same

legal analysis at both the preliminary injunction stage and the permanent injunction stage, and reach different results. "This result may be viewed through the lens of the different standards for preliminary and permanent injunctions: although Plaintiffs were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual success on the merits at the permanent injunction stage ..." *Id.*, at p. 569, Ftnt. 7. This statement demonstrates the crux of the disagreement between the holding in *Smyth v. Rivero* and the determination in this case that preliminary injunctions can support an award of fees to a prevailing party.

The Respondents lost on the merits after Petitioners were able to fully develop of a factual record and present their case on the merits. Emergency hearings and preliminary injunctions are not hearings and orders on the merits of a case, and only allow an abbreviated analysis of the case. Respondents should be required to achieve actual success on the merits before Petitioners are required to pay their attorney's fees. Otherwise, claimants are encouraged to file emergency pleadings, reducing their opponent's opportunity to develop their case. A victory after an emergency hearing against an opponent having a very limited opportunity to present a defense should not carry the same weight as a victory after a hearing on the merits with a fully developed record and opportunity to be heard. This case demonstrates the importance of a hearing on the merits after discovery and a fully developed record.

An abbreviated examination of the merits of the facts and the law at a preliminary hearing does not transform the emergency hearing to a hearing on the merits. In this case, the notice was short, the record

was incomplete, and there was insufficient time for the attorneys for the State to prepare their opposition to Respondents' case. Moreover, a party must show a substantial likelihood of success on the merits, and not success on the merits, in order to establish the elements for a preliminary injunction. The district court's ruling is not transformed into a finding on the merits because the court examined the substance of the parties' positions.

C. The other Circuit Courts of Appeals hold that a preliminary injunction determined 'on the merits' is sufficient to support a finding of prevailing party status.

Several other Circuit Courts of Appeal have applied *Buckhannon* to the question of whether preliminary injunctive relief can afford prevailing party status with differing results. Most hold that if the decision to award preliminary relief was based on an inquiry into the merits, prevailing party status is established. The D.C. Circuit in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005), discussed a three prong test gleaned from the *Buckhannon* decision. Discussing *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486 (D.C.Cir.2003), the appellate court explained that "*Buckhannon* embraces three core principles for construing the term 'prevailing party' in federal fee shifting statutes: ..." *Id.*, at 946. The three principles are that 1) plaintiff must show a change in the legal relationship, 2) judgment must be rendered in the party's favor, and 3) there must be some judicial relief as opposed to merely a judicial pronouncement. *Id.*, at 947. The D.C. Circuit Court further explained,

> "In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make a plaintiff a 'prevailing party' under a fee shifting statute like the EAJA. Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can *never* transform a party in whose favor the injunction is issued into a 'prevailing party' under the EAJA."

Id., 400 F.3d at 945.

In applying the three prong test discussed above, the appellate court focused on the district court's finding that the Milk Producers "undoubtedly would have succeeded on the merits." *Id.* at 948. "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt." *Id.* In other words, the court's prediction of success on the merits was sufficient to confer prevailing party status.

Such a standard for establishing entitlement to fees poses a difficult test to perform. Federal courts would be required to establish one standard before entering a preliminary injunction, and a second standard to determine whether attorney's fees are available. Moreover, if the merits are actually litigated to final judgment, and there is no success on the merits, the inquiry should be irrelevant.

Other Circuit Courts of Appeal agree with the D.C. Circuit. For example, in *Watson v. County of Riverside*, 300 F.3d 1083 (9th Cir. 2002), plaintiff was a former deputy sheriff who was terminated after a

highly publicized incident of excessive force. After his return to the station, plaintiff was ordered to prepare a report without the assistance of an attorney or a union representative. Plaintiff filed suit for violation of his civil rights and seeking to keep the report from being introduced at the administrative hearing on his termination. Plaintiff won at the preliminary injunction stage of the proceedings and an order was entered preventing defendants from introducing the report at the administrative hearing. Thereafter, the district court dismissed all the claims, except for the claim for injunctive relief with regard to the hearing, which had already taken place. After the parties agreed the remaining claim was moot, the court dismissed the case. The district court found the plaintiff was a prevailing party, and awarded attorney's fees. The appellate court upheld the ruling, finding that "[a] preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*."

The Second Circuit Court of Appeals has also adopted an approach where a decision to award a preliminary injunction can establish prevailing party status if the determination is made on the merits. In *Haley v. Patacki*, 106 F.3d 478 (2nd Cir. 1997) the court held that "we do not automatically require a denial of attorney's fees when a party receives a stay or preliminary injunction but never obtains final judgment..." *Id.*, at 483. "Instead, a decision to award attorney's fees requires an analysis of whether the party's relief, whether by injunction or stay, resulted from a determination on the merits." *Id.* Moreover, the court explained that "[a] determination of whether a court's action is governed by its assessment of the merits 'requires close analysis of the decisional circumstances and reasoning underlying the grant of

preliminary relief." *Id.*, at 483, quoting *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994).

These cases demonstrate that although a determination of entitlement to preliminary relief can include an examination of the merits, a preliminary injunction is granted when a party establishes only the lesser standard of a likelihood of success on the merits. Thus, according to the Circuit Courts of Appeal with the exception of the Fourth, it follows that if a party prevails on the lesser standard of likelihood of success on the merits, the party will be entitled to attorney's fees. That standard is inconsistent with this Court's previous holdings that the standard must be success on the merits. *Buckhannon, id.; Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672 (1987).

D. Respondents are not prevailing parties under *Smyth v. Rivero*.

In this case, the Eleventh Circuit found that Respondents had established a likelihood of success on the merits, but were unable to achieve actual success on the merits. *Wyner v. Struhs*, 179 Fed.Appx. at 569, Ftnt. 7. (App.1a) This case demonstrates that likelihood of success on the merits does not equate with success on the merits. Applying the standard discussed in *Smyth v. Rivero*, Respondents are not prevailing parties because they lost on the merits of their claims. Respondents convinced the district court at an emergency hearing, which Petitioners attended by telephone, and of which Petitioners were given almost no notice, that their Constitutional rights were violated by restricting them from performing plays and demonstrations in the nude at the park. After full development of the facts, and time for Petitioners to

prepare and present their case, the district court found exactly the opposite: That restricting Respondents from performing in the nude did not violate their Constitutional rights. Therefore, Respondents did not prevail on the merits, they are not entitled to attorney's fees.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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(any footnotes trail end of each document)

No. 04-14750
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

Versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

April 25, 2006, Decided

April 25, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For David B. Struhs, Terence Coullitte, Appellants: Carri S. Leininger, Williams Leininger & Cosby P.A., WEST PALM BCH, FL.

For Terence Coullitte, Appellant: Barbara Jeanne Taggart, Williams Leininger & Cosby, WEST PALM BCH, FL.

For T. A. Wyner, Appellee: Randall C. Marshall, American Civil Liberties Union of Florida, Miami, FL.

For George Simon, Appellee: James K. Green, James K. Green, P.A., WEST PALM BEACH, FL.

JUDGES: Before EDMONDSON, Chief Judge, BARKETT, Circuit Judge, and HUNT, * District Judge.

OPINION: PER CURIAM:

This appeal raised the issue of whether Plaintiffs can be a "prevailing party" and awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs obtained a preliminary injunction that prevented state park officials from interfering with Plaintiffs' enactment of a nude peace symbol at a public beach. But later in the case at summary judgment, Plaintiffs lost their facial claims against the state rules that prohibited nudity at the beach and that gave park officials power to enact reasonable time, place, and manner restrictions on expressive activity. The district court denied Plaintiffs permanent relief. Defendants therefore appeal the district court's award of attorney's fees to Plaintiffs for Plaintiffs' success in obtaining the preliminary injunction.[1]

To qualify as a prevailing party, the plaintiff must obtain the primary relief sought in the case. *Taylor v. City of Ft. Lauderdale,* 810 F.2d 1551, 1555-56 (11th Cir. 1987). Taylor said that "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees." *Id.* at 1558. As an initial matter, we accept that the

preliminary injunction in this case decided a substantive issue -- whether or not the state officials could arrest the nude peace symbol participants -- and thus was on the merits.

The more important question now is whether the district court granted the preliminary injunction based on a mistake of law. Defendants claim that the district court conducted identical legal analyses on identical facts but reached different results on the motions for preliminary and permanent injunctions. If the preliminary injunction was based on a mistake of law such that Plaintiffs "were never actually prevailing parties at all[,]" *id.* at 1558, then Plaintiffs are entitled to no attorney's fees. For example, in Doe v. Busbee, this Court determined that despite obtaining preliminary and permanent injunctions and summary judgment, the plaintiffs were not prevailing parties under section 1988, because two Supreme Court decisions preexisting the award of attorney's fees countered the district court's reasoning in issuing the injunctions and prompted the injunctions and judgment to be vacated under rule 60(b). 684 F.2d 1375, 1381 (11th Cir. 1982). Therefore, the Busbee court reversed the award of attorney's fees. *Id.* at 1382-83.

In the instant case, Plaintiffs raised both as-applied and facial challenges to Fla. Admin. Code Ann. r. 62D-2.014(7)(b),[2] prohibiting nudity at the beach, and to Fla. Admin. Code Ann. r. 62D-2.014(18),[3] allowing state park officials to regulate the time, place, and manner of expressive conduct at the beach. On their as-applied challenge, Plaintiffs obtained a preliminary injunction that prohibited Florida officials from interfering with Plaintiffs' one-time enactment of a nude peace symbol

at a public beach. The district court assumed for the sake of the preliminary injunction order that the rules were applied in a content-neutral manner n4 and, thus, applied the test set out in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), to evaluate the validity of the restrictions. According to the pertinent written order, the court granted the injunction because a settlement agreement from previous litigation between the parties showed a less restrictive alternative to a total ban on nudity: Plaintiffs could perform the nude peace symbol on an area of the beach that would be hidden behind a cloth screen. This approach would allow the expressive conduct, but protect the public from the offense of nudity. The Defendants' attorney conceded at the preliminary injunction hearing that this approach might be an acceptable alternative.

Later at summary judgment, Plaintiffs lost their facial challenge to Fla. Admin. Code Ann. r. 62D-2.014(7)(b).[5] Plaintiffs' attorney admitted at the hearing that Plaintiffs and other participants had not remained behind the cloth screen during the nude peace symbol demonstration, and a fair reading of the record shows that Plaintiffs had no intention of remaining behind a cloth screen or other barriers during future nude expressive works. In the summary judgment order, the district court again applied the O'Brien test but -- based on these new developments -- said a total ban on nudity was no greater than was essential to further the government's interest in protecting the public from the offense of nudity, because "Park authorities were . . . unable to ensure that those engaged in the expressive conduct stayed behind the screen."[6] The court did award attorney's fees to Plaintiffs for the work they

expended obtaining the preliminary injunction, however.

We have reviewed the record for abuse of discretion and conclude that no reversible error occurred. Although in both orders, the district court applied the O'Brien test, in the summary judgment order the court relied on new facts presented at the summary judgment hearing which demonstrated that the less restrictive alternative was not sufficient to protect the government's interest.[7] Thus Plaintiffs did not earlier obtain the preliminary injunction based on a mistake of law.

Plaintiffs are entitled to prevailing party status and attorney's fees because the court granted the preliminary injunction on the merits and Plaintiffs obtained the primary relief they sought. *Taylor v. Ft. Lauderdale*, 810 F.2d at 1555-56, 1558. The district court properly limited the fee award to the degree of Plaintiffs' success. See *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983) (saying degree of success is the most important factor in determining amount of attorney's fees).

AFFIRMED.

* Honorable Willis B. Hunt, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

n1 Defendants' challenges to the underlying preliminary injunction are moot because the injunction was about a finite event that occurred and ended on a specific, past date. See *Johnson v. Fla. High School*

Activities Assoc., Inc., 102 F.3d 1172 (11th Cir. 1997) (concluding challenge to injunction allowing age-ineligible high school student to play high school football was moot after the student's final football season ended).

n2 The full text of the regulation says, "In every area of a park including bathing areas no individual shall expose the human, male or female, genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering."

n3 The full text of the regulation says, "Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material, displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's natural or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity."

n4 The district court said in the summary judgment hearing and wrote in the summary judgment order that the earlier preliminary injunction was based on testimony that indicated that Defendants were applying the rules in a content-based manner because the peace symbol was an anti-war protest. But, in the actual order granting the preliminary injunction, the

court said it was not necessary to determine whether the rules were applied in a content-based manner, and assumed content neutrality for the purposes of the order. Although the court's statements in the later summary judgment hearing and order about the reason for the earlier preliminary injunction were incorrect, that does not mean that the preliminary injunction was based on a mistake of law.

n5 Plaintiffs also lost their facial challenge to Rule 62D-2.014(18), because it gave the park manager discretion only about the time, place, and manner of free speech activities, not discretion to prevent free speech activities.

n6 We recognize that at the preliminary injunction hearing, one of the plaintiffs mentioned that on another occasion a few years earlier, not all the participants in a nude expressive work had remained behind the provided cloth screen because participants thought they had "already clarified [with Park officials] that the screen had a chilling effect." This circumstance does not change our analysis, however, because it did not express that Plaintiffs had decided to dishonor the settlement agreement and would refuse to remain behind a cloth screen if one were set up for the nude peace symbol. In addition, Defendants conceded at that hearing that the cloth screen might be sufficient to protect Defendants' interests.

n7 This result may also be viewed through the lens of the different standards for preliminary and permanent injunctions: although Plaintiffs were able to show a substantial likelihood of success at the preliminary injunction stage, they were unable to achieve actual

success on the merits at the permanent injunction stage because of their intervening failure to abide by the less restrictive alternative.

Case No. 03-80103-CIV-MIDDLEBROOKS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

T.A. WYNER and GEORGE T. SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

February 27, 2003, Decided
February 27, 2003, Filed

COUNSEL: For T. A. WYNER, GEORGE SIMON, plaintiffs: Randall C. Marshall, American Civil Liberties Union, Miami, FL.

For T. A. WYNER, GEORGE SIMON, plaintiffs: James Kellogg Green, James K. Green, West Palm Beach, FL.

For DAVID B. STRUHS, TERENCE COULLITTE, defendants: James Orrin Williams, Jr., Barbara Jeanne Taggart, Williams Leininger & Cosby, West Palm Beach, FL.

JUDGES: DONALD M. MIDDLEBROOKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: DONALD M. MIDDLEBROOKS

OPINION:

CORRECTED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE comes before the Court upon Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, filed February 12, 2003. The Court has reviewed the record, heard argument and received evidentiary submissions at a hearing, and is otherwise fully advised in the premises.

Plaintiff Wyner comes before this Court seeking an order prohibiting state park officials at John D. MacArthur Beach State Park ("Park") from arresting her or otherwise interfering with her planned "temporary art installation comprised of nude bodies in the form of a peace sign" scheduled for February 14, 2003.[1] Plaintiff Simon is a videographer who plans to attend the event and seeks to view it in its planned format. (Simon Aff. PP 3, 7). Defendants have indicated that they will not permit the event to take place, or at least, that they consider the event as described to be a violation of park rules. This is not the first time Wyner has sought to engage or has engaged in nude activities at the Park. In fact, Wyner has a long history of engaging in such activity that dates back at least thirteen years. These events have been met at times with the threat of arrest and later, with cooperation or at least tolerance. Based on the Park's response to Wyner's recent notice of her plans, any period of

cooperation or tolerance has come to an end. Some historical background of this relationship is helpful to understanding the context of this motion.

The Park is a recreation area including nature trails and a beach among other attractions. Part of it sits on land that, prior to state control, was considered a "clothing optional" beach. *See McGuire v. State, 489 So. 2d 729, 730 (Fla. 1986).* In 1990, Wyner and others went to the Park to engage in a protest of recently adopted clothing and speech restrictions. Wyner, not in violation of the rules on attire, was clothed only in an opaque copy of the *Bill of Rights*, and spoke in favor of the rights protected by the *First Amendment.* She was arrested and charged with disorderly conduct, but those charges were later dropped for lack of probable cause. Wyner instituted a civil rights violation suit and was awarded damages, but that result was later overturned on appeal on the basis that park officials were entitled to qualified immunity. *See DeWald v. Wyner, 674 So. 2d 836 (Fla. 4 Dist. Ct. App. 1996).* In 1991, Wyner directed and performed in a play at the Park entitled MacArthur: The Man and the Beach which included nude scenes. Wyner and others were arrested, but again, those charges were dismissed. In 1995, she and Plaintiff Simon instituted civil [**4] rights actions for damages in connection with those arrests and the termination of the play. The Simon case reached a settlement which, in pertinent part, included the following terms

> 2. While defendants do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is

> generally protected by the *First Amendment* subject to reasonable restrictions on time, place and manner.
> 3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A. Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park.
> 4. The play shall be performed at least 100 yards north of the northernmost boardwalk on the beach in an area from the dune line to the ocean.
> 5. Plaintiff and his representatives shall arrange for placement of a bolt of cloth in a semi-circle around the area where he play will be performed.
> 7. At least fourteen (14) days before the play, T. A. Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

(Pls.' Compl. Ex. 1). At least twice, Wyner has directed and performed in the play, both with and without nudity and both with and without the cloth screen described in the settlement, without arrest or incident.

On January 29, 2003, apparently in the continued spirit of cooperation, Wyner sent an email to Defendant, Park Manager Terrence Coulliette, notifying him of her intentions with regard to the event

planned on February 14, 2003. (Pls.' Compl. Ex. 2). The entire event is scheduled to last approximately three hours with the actual exhibition lasting less than half that time. *Id.* Wyner estimated approximately fifty participants in the event. *Id.* The initial email response from Defendant Coulliette appeared promising, including the statements that "I am sure everything will work out fine, as we communicate effectively, and seek cooperation and understanding ...." and "I do not anticipate any problems at this time." (Pls.' Compl. Ex. 3). However, problems appear to have arisen. The next communication from Defendants stated in part as follows:

> At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the *First Amendment*. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction. You are of course free to conduct your activities, absent the nudity.

(Pls.' Compl. Ex. 4). The questions presented before this Court then are, judging on the standards applied to a preliminary injunction motion, whether the planned activity is indeed expressive conduct, and if so, whether the restrictions, as applied to this activity, are permissible, and thus whether Defendants' prevention of the event would be a *First Amendment* violation.

The legal standard for a preliminary injunction pursuant to *Federal Rule of Civil Procedure 65(a)* is as follows. The moving party must demonstrate (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that, if issued, the injunction would not be adverse to the public interest. *Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000)*; *McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)*. "[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion' as to each of the four prerequisites." *McDonald's Corp., 147 F.3d at 1306* (internal citations and quotations omitted).

The primary consideration for this Court in addressing the present motion is whether, if Defendants do prevent the planned event, a violation of Plaintiffs' *First Amendment* rights will occur. Addressing the four burdens for a preliminary injunction motion in reverse order in order to resolve efficiently several steps in the process, it is first recognized that, if suppression of this activity would be unconstitutional, allowing that to happen would be adverse to the public interest. Alternatively, permitting the event to go forward will benefit the public interest. *See, e.g., Stromberg v. California, 283 U.S. 359, 369, 75 L. Ed. 1117, 51 S. Ct. 532 (1931)* [**8] ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

essential to the security of the Republic, is a fundamental principle of our constitutional system."). The threatened injury to the movant in this case also outweighs whatever damage the proposed injunction may cause the opposing party. Again assuming a constitutional violation, that injury far exceeds the logistical or practical difficulties that may be faced by defendants, especially given that no group tours and no special events are planned in the Park during the time for the event. (Compl. Ex. 2). The question of irreparable harm is also answered in the affirmative in this context. "The loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976)* (citing *New York Times Co. v. United States, 403 U.S. 713, 29 L. Ed. 2d 822, 91 S. Ct. 2140 (1971))*. Thus, this Court is left with only the first question in the preliminary injunction test: whether Plaintiffs have shown a substantial likelihood of success on the merits.

The Court is presented first with a question as to the nature of the conduct. With regard to the initial question whether the proposed activity is in fact expressive conduct that is protected under the *First Amendment*, the answer is yes. Nude overtly political speech in the form of a "living nude peace symbol" is expressive conduct well within the ambit of the *First Amendment*. Artistic endeavors involving nudity as part of their expression such as the musical *Hair* have been accorded *First Amendment* protection. *Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 550, 557-558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975)*. Wyner, in her testimony, explained her planned event and the importance of nudity to its concept as a means

of demonstrating the nonthreatening nature of the event and the vulnerability of peace and the participants. Wyner related this explanation to her history of anti-war activity dating back to the Kent State shootings in 1970 and the understandable desire to communicate this message, as well as the absence of weapons at the event, both to the audience and to authorities.

It has previously been held that the Park is a public forum. *Naturist Society, Inc. v. Fillyaw, 958 F.2d 1515, 1521-23 (11th Cir. 1992).* That said, some reasonable restrictions may be placed on the exercise of *First Amendment* rights. *Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984).* Those restrictions may relate to the time, place and manner of the conduct. *Id.* The validity of those restrictions is judged by the following test: whether the restriction (1) is justified without reference to the content of the regulated speech; (2) serves a significant government interest; (3) is narrowly tailored to serve that interest; (4) leaves open ample alternative channels for communication of the information. *Id. at 293.* The regulations in question here are the Department of Environmental Protection rules prohibiting nudity on the beach and governing free speech activities. FLA. ADMIN. CODE ANN. r. 62D-2.014(7)(b) and FLA. ADMIN. CODE ANN. r. 62D-2.014(18).

First, are these rules content neutral? Plaintiffs have raised a cloud over Rule 2.014(18) and the apparently unchecked discretion provided to the Park Manager in consultation with Department lawyers. Rule 2.014(7)(b) prohibits nudity as defined in this section with regard to bathing and swimming. Plaintiffs

made the important point that nudity in free speech activities has been permitted in the past under Rule 2.014(18) and thus, that a plausible interpretation of the nudity prohibition relates only to bathing and swimming activities as that section is titled under Rule 2.014(7). The question of whether these rules have been consistently applied in a content neutral fashion involves a more fact-specific analysis of the pattern of implementation, and at least some of the testimony received at the hearing indicates that content neutrality may not be present. The Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or antiwar protest. Since an answer to that question is not essential to this analysis, however, it is not further addressed herein. Content neutrality is hereafter assumed only for the purposes of this order.

The *O'Brien* test has been applied to determine the validity of content neutral restrictions. *See City of Erie v. Pap's A.M., 529 U.S. 277, 289-90, 146 L. Ed. 2d 265, 120 S. Ct. 1382.* The *O'Brien* test requires that the regulation (1) be within the government's constitutional power to enact; (2) further a substantial or important government interest; (3) is unrelated to the suppression of free expression; (4) is no greater than is essential to further the government interest. n2 *Id.*

Does the regulation serve a significant government interest? The answer depends on the interest being served, and here the answer is again in the affirmative. The prevention of nudity in a state park may serve multiple interests. Preventing preemption of clothed bathers from using the park, protection of the public

from the 'offense' of nudity, and park preservation and aesthetics may all serve as substantial or important government interests. Here, the Defendants have given clear indication of the interest they believe the rule serves. The letter sent to Plaintiff by Defendant Coulliette is clear that the state "has a significant interest in keeping the entire park open to all visitors during operating hours ...." That letter went on to state, "you are of course free to conduct your activities, absent the nudity," indicating that the sole obstacle to achieving the state's interest is neither the space occupied by the event nor any other aspect of the event except the nudity of the participants. (Compl. Ex. 4). That interest in protecting the public from the potential offense of nudity meets this standard.[3]

Is this rule sufficiently narrowly tailored to serve that interest? The question of narrow tailoring is one of whether the restriction "burdens substantially more speech than is necessary to further" the state interest. *Ward v. Rock Against Racism, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989).* In many cases, this question is a theoretical one that must be answered by measuring the governmental rule against hypothetical less restrictive alternatives that have been neither tried nor tested and have not been demonstrated to effectively serve the government's interest. Here, that is not the case, and that factual distinction indeed makes all the difference in the outcome of this case as compared to other cases involving nudity and expression. There have already been instances of nude expression allowed in the Park. The settlement lays out a number of agreed-upon manner restrictions that are far less restrictive than the total ban on nudity in the Park.[4]

Acknowledging the above facts and the demonstrated less restrictive alternatives, it is impossible to maintain the total ban on nudity as a reasonable restriction on the manner in which the "living nude peace symbol" may be presented. The present restriction prevents this form of expression in full. While a living peace symbol might still be performed, a nude one is totally and unnecessarily prohibited. The choice need not be either/or. Plaintiffs' desired expression and the interests of the state may both be satisfied simultaneously. Reaching that determination, the Court finds that Plaintiffs have clearly satisfied the burden of persuasion of showing a likelihood of success on the merits of this case.[5]

In many respects, this case may seem trivial, but it also raises serious issues of freedom and expression. The value of freedom is found not only in the larger issues of life but also in the fanciful and strange. Events like Fantasy Fest in Key West and the Mango Strut in Miami may not be to everyone's taste, but they add to the spice of life in South Florida that for the most part, we enjoy. For several years at MacArthur Park, the Plaintiff, at times wearing nothing but the *Bill of Rights*, has been disrobing as part of her expression. Her actions have been tolerated by the state. Protesting a potential war through naked protest seems a bit quixotic, but it is also part of the freedom that both those supporting the war and those who oppose it seek to protect. Defendants shall neither prevent nor interfere with Plaintiffs' planned event on February 14, 2003. The Court wishes to make clear, though, that this injunction does not preclude the posting of notices or signs advising Park visitors of the

occurrence of this event nor the use of other measures used in the past with respect to the play.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction is GRANTED. The parties have agreed that security is not necessary in this instance and therefore, none will be required.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 27th day of February, 2003.

DONALD M. MIDDLEBROOKS

UNITED STATES DISTRICT JUDGE

Footnotes

n1 This activity may be described both as art and as political advocacy. As the February 12, 2003 edition of the *Palm Beach Post* described the event in an article entitled *Nude Protest Against War*

> Washington is on a war footing, and after years in dresser drawers and scrapbooks and boxes filled with mementos, peace signs are reappearing. Antiwar rallies will be held in many cities this weekend and many Palm Beach Countians are heading to Washington. Those wishing to make a point here can visit MacArthur Beach State Park on Friday morning. Organizers expect to create a "Living Nude Peace Sign" around 11 a.m. T.A. Wyner, longtime

> advocate of clothing-optional beaches, is coordinating the event, which is being held in conjunction with the annual Midwinter Naturist Festival at Sunsport Gardens in Loxahatchee. 'We don't know how many people we'll get,' festival organize Morley Schloss said. 'If we get a lot we'll have a big sign. If we don't we'll have a smaller one. But we'll still make our point. We expect people to join us who are not part of the festival as well.'

n2 The factors of the *O'Brien* test are organized differently, however the crucial analysis and the result in this case would be essentially the same regardless of which test were applied. This Court applies the time, place or manner analysis with regard to a public forum.

n3 Additional indication of the predominance of this state interest exists in the form of the settlement referred to above. In the settlement, the state agreed to permit nudity on the beach, however it insisted upon distance restrictions from busier areas and a cloth barrier to prevent unwilling exposure to the nudity. Thus, in this case, it is not nudity itself that the state seeks to prevent on the basis of moral objection (as Justice Scalia has theorized for other anti-nudity rules *See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 575, 115 L. Ed. 2d 504, 111 S. Ct. 2456*). Rather it is the offensive effect that nudity might have on others that the state hopes to eliminate. *See id. at 590-91* (White, J., dissenting).

n4 Plaintiff has indicated displeasure with those restrictions, however it is not the job of this Court to

mandate any less restrictive alternatives. It is sufficient that less restrictive alternatives exist that can be and have been put in place which allow significantly more expressive conduct for this Court to decide that the current rule if applied to the present factual circumstances would be unconstitutional. Now is not the time to consider the full range of possibilities. If, in the future, the Park adopts a less restrictive alternative and Plaintiffs or others are not satisfied with that rule, that rule may be challenged at that time.

n5 Plaintiffs also identify alternative bases for success on the merits. Plaintiffs challenge the rule and its application as not neutral with respect to content. They also suggest a facial attack on the validity of the manner restriction determination made by the Park Manager pursuant to FLA. ADMIN. CODE ANN. r. 62D-2.014(18) and possibly that the ability of the Manager to make case by case restrictions without substantial limits to his discretion may indicate an invalid prior restraint. This Court does not address those further but neither does it determine that those bases are not valid.

1/28/2004
Case No. 03-80103-CIV-MIDDLEBROOKS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

T.A. WYNER and GEORGE T. SIMON,
Plaintiffs,

v.

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, and TERRENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendants' Motion for Summary Final Judgment (DE 45), filed November 17, 2003 and Plaintiffs' Motion for Summary Judgment (DE 55), filed December 8, 2001 The Court has reviewed the record and is otherwise fully advised in the premises.

The case is another chapter in the struggle between the State's power to provide for the public health, safety and, moralsfn1 of its citizens, and certain Floridians' desire to express themselves. John D. MacArthur Beach State Park is a multi-use, public, state park.

Despite a history of working together and strong connectedness to the park and its beneficial utilization the Defendants, representatives of the Florida Department of Environmental Protection. ("DEP"), and Plaintiffs, private citizens, have reached an impasse over a decisive question, whether the State's regulation banning nudity In public parks amounts to a, constitutional general ban on conduct, or an impermissible violation of the First Amendment's guarantee of freedom of expression The Court finds that although the First Amendment guarantees freedom of speech, it also allows for incidental limitations on freedom of expression based on sufficiently important governmental interests in regulating conduct.

Facts

Plaintiff Wyner and Plaintiff Simon have a long history of expressive conduct within John D. MacArthur Beach State Park ("Park) that dates back at least thirteen years, These events have been met at times with the threat of arrest and later, with cooperation or at least tolerance Some historical background of this relationship is helpful to understanding the context of this motion.

The Park is a recreation area including nature trails and a beach among other attractions, Part of it sits on land that, prior to state control, was considered a "clothing optional" beach. See McGuire v. State, 489 So, 2d 729, 730 (Fla. 1986), In 1990, Ms, Wyner and others went to the Park to engage in a protest of recently adopted clothing and speech restrictions. Ms. Wyner, not in violation of the rules on attire, was clothed only

in an opaque copy of the Bill of Rights, and spoke in favor of the rights protected by the First Amendment. She was arrested and charged with disorderly conduct, but those charges were later dropped for lack of probable cause. Ms. Wyner instituted a civil rights violation suit and was awarded damages, but that result was later overturned on appeal on the basis that park officials were, entitled to qualified immunity. See DeWald v. Wyner, 674 So. 2d 836 (Fla. 4 Dist. Ct. App. 1996). In 1991, Ms. Wyner directed and performed in a play at the Park entitled MacArthur, The .Man and the Beach which included nude scenes. Ms. Wyner and others were arrested, but again, those charges were dismissed, In 1995, she and Plaintiff Simon instituted civil rights actions for damages s in connection with those arrests and the termination of the play. The Simon case reached a settlement which, in pertinent part, included the following terms:

2. While defendants do not condone or encourage nudity at John D. MacArthur each State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner.

3. In an effort to coordinate expressive activities and to develop a cooperative relationship with defendants, plaintiff and his representatives, specifically including T. A, Wyner, hereby notify defendants that they intend to perform the play "MacArthur/The Man and the Beach" at John D. MacArthur Beach State Park.

4. The play shall be performed at least 100 yards north of the northern most boardwalk on the beach in an area from the, dune line to the ocean,

5. Plaintiff and his representatives shall arrange

for placement of a bolt of cloth in a semi-circle around the area where the play will be performed.

7. At least fourteen (14) days before, the play, TA, Wyner or her designee shall contact the park manager to provide a best estimate as to the number of participants and size of the audience in order to assist defendants in planning for the performance.

(Pls.' Exh. 1). At least twice since the settlement, Ms. Wyner has directed. and performed in the play, both with and without nudity and both with and without the cloth screen described above, without arrest or incident, (Wyner Depo. at 51-52). The actions giving rise to this suit began in 2003.

Florida Administrative Code Rule 62D-2.014 (I8), the "Free Speech Activities Rule" provides:

Free speech activities include, but are not limited to, public speaking, performances, distribution of printed material displays, and signs. Free speech activities do not include activities for commercial purposes. Any persons engaging in such activities can determine what restrictions as to time, place, and manner may apply, in any particular situation, by contacting the park manager. Free speech activities shall not create a safety hazard or interfere with any other park visitor's enjoyment of the park's, natural. or cultural experience. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring that the time of the free speech activity.

FLA. ADMIN. CODE ANN. r. 62D-2.014(18), The parties agree that Defendant Coulliette was at all material times hereto an employee of the DEP and the

park manager of the John D. MacArthur Beach State Park, In mid-January, Ms, Wyner called Mr. Coulliette to inform him that on Valentine's Day she intended to produce a temporary art installation comprised of nude bodies in the form of a peace sign. After discussing her plans with his supervisor, Mr. Coulliette requested that Ms. Wyner provide a written request. On January 29, 2003, Ms. Wyner sent an email to Mr. Coulliette notifying him of her intentions with regard to the event planned on February 14, 2003, (Pls.' Exh. 2).

Mr. Coulliette responded by email that he would forward Ms. Wyner's request to the Bureau Chief (Pls. Exh. 3). Subsequently, Mr. Coulliette indicated by letter dated February 6, 2003, that the DEP would allow the production, but required adherence to the clothing requirements of the Florida Administrative Code's bathing suit regulation. (Pls.' Exh. 4). This communication from Defendants stated in part:

At this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment. However, even if this was not the case, the Division believes that it has a significant interest in keeping the entire park open to all visitors during operating hours and that the decision not to allow nudity as part of your demonstration is a reasonable manner restriction You are of course free to conduct your activities) absent. the nudity. You must wear the minimal amount of clothing in the Park as required by section 62D2.014(7)(b).

(Pls.' Exh. 4), Florida Administrative Code Rule 62D-2,014(7)(b), known to Defendants as the "Bathing Suit Rule" and to Plaintiffs' as the "Bathing and Swimming"

rule, provides:

In every area of a park including bathing areas no individual shall expose the human, male or female genitals, pubic area, the entire buttocks or female breast below the top of the nipple, with less than a fully opaque covering.

FLA. ADMIN. Code ANN. r. 62D-2.014(7)(b).

On February 12, 2003, Plaintiffs filed the Complaint (DE 1) and Emergency Motion for Temporary Restraining Order and/or Preliminary Injunction (DE 4) seeking Court intervention to prevent state park officials from interfering with expressive activity containing nudity. (Pls.' Compl. Par. 1). On February 13, 2003, this Court issued an Order prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation.fn2 After the Court's ruling on February 13, 2003, Mr. Coulliette did not interfere with the temporary art installation on February 14, 2003. (T.A. Wyner Depo. at 24, 26, 49, 51).

Summary Judgment Standard

Summary judgment is appropriate only when there are no genuine issues of material fact and the movant is entitled to Judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of meeting this exacting standard. See Adickes v. S.H. Kress, & Co., 398 U.S. 144, 157 (1970). In applying this standard., the evidence, and all reasonable factual inferences drawn therefrom, must be viewed in the light most

favorable to the nonmoving party. See Arrington v. Cobb County, 139 F. 3d 865, 871 (11th Cir. 1998); Allen v. Tyson Foods, Inc., 121 F. 3d 642, 646 (11th Cir. 1997).

The non-moving party, however, bears the burden of coming forward with evidence of each essential element of their claims, such that a reasonable jury could find in their favor. See Earley v. Champion 1110 Corp., 907 F. 2d 1077, 1080 (11th Cir. 1990). The non-moving party "[m]ay not rest upon the mere allegations and denials of [its] pleadings, but [its] response... must set forth specific facts, showing that there is a genuine issue for trial." FED. R. Civ. R 56(e). "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the Jury could reasonably find for the [non-movant]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986), Further, conclusory, uncorroborated allegations by a plaintiff in an affidavit or deposition will not create an, issue of fact for
trial. sufficient to defeat a well supported summary judgment. See Earley, 907 F.2d at 1081, The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment See Celotex, 477 U.S. at 322. It is from this point that we begin our analysis.

Defendants' Motion for Summary Final Judgment

Count I Against Defendant Coulliette Individually.

Plaintiffs allege that Mr. Coulliette forwarded Ms. Wyner's request to his supervisors, and informed her of the Department's decisions regarding time, place and

manner restrictions. (Pls.' Compl, Pars. 30-33). Plaintiffs seek monetary damages in an amount less than twenty (20) dollars against Mr. Coulliette. He asserts a defense of qualified immunity. (Defs' Ans. at 5.), Qualified immunity protects a government official acting in his official capacity unless he "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]., Harlow v. Fitzgerald, 457 U.S, 800, 815 (1982)(internal citations omitted), This defense for officials protects against "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Harlow, 457 U. S. at 814 (1982)(internal citations omitted).

The analysis of a qualified Immunity defense is twofold. First., the defendant official must prove that the relevant conduct occurred while lie was acting within the scope of his discretionary authority. Second, if the official does so prove, the plaintiff must prove that the conduct violated clearly established law. Harbert Intern., Inc., v. James, 157 F. 3d 1271, 1280-81 (11th Cir. 1998); Evans v. Hightower, 117 F. 3d 1318, 1320 (11th Cir. 1997).

Qualified immunity is available to officials acting within the scope of their authority and pursuant to the performance of duties within the scope of that authority. All parties agree that Defendant Coulliette was at all material times a park manager employed by the DEP and acting under color of state law. Plaintiffs, however, contest that Mr. Coulliette was acting within the scope of his discretionary authority. They correctly

point out that it was not specifically Coulliette who made the decision regarding the DEP's reaction to the nude protest, nor did he write the draft of the February 6 letter, Coulliette Depo. at 109). While this is true, they do agree that it was in fact Mr. Coulliette who sent Ms. Wyner the final version of the letter. (pls. Exh. 4). Moreover, as the park manager, when he told Ms. Wyner in the February 6 letter that she would be required to adhere to Rule 62D-2.014(7)(b) on February 14, 2003, he was acting within the scope of his discretionary authority as defined by Rule 62D-2.014 (18), which states that the "park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities occurring at the time of the free speech activity." Although Mr. Coulliette was not the only or even primary person involved in making the decision does not alter that fact that such decision making is within the scope of his discretionary authority as legally defined in Rule 62D-2.014(18).

Because we find that Mr. Coulliette was acting within the scope of his discretionary authority, the Court now examines whether he violated clearly established law. In order to determine if Mr. Coulliette violated clearly established law, the Court must evaluate whether the facts alleged, taken in the light most favorable to the party asserting the injury, show (1) violation of a constitutional right and (2)that the right was clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, 457 U.S. at

818 (1982), We now determine whether Mr. Coulliette violated clearly established law.

The question to be answered is whether it was clearly established as of February 2003 that Mr. Coulliette's attempt to enforce the bathing suit rule and the free speech activities rule would violate Plaintiffs' rights. The Court finds that it was not. The Court declines to address whether Mr. Coulliette's actions were constitutional. It does, however, find that it was not already established that Mr. Coulliette's actions were unconstitutional. Given the state of the law, would be reasonable for Mr. Coulliette to believe he was acting legally, first, clearly established Supreme Court precedent provides that even in a public forum, the government may impose reasonable restrictions on the time, ,place, manner of protected speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Second, in Frandsen v. Department of Environmental Protection., 829 S.2d 267(Fla. 1st DCA. 2002), the First District Court of Appeals of Florida held that Florida Administrative Code 62D-2.014(18), the "Free Speech Activities Rule" was not an unconstitutional restriction on free speech. Thus, Mr. Coulliette cannot be found to have violated clearly established law. Furthermore, the Eleventh Circuit has stated that if "applicable law is unsettled, immunity necessarily results," Nicholson v. Georgia Dept. of Human Resources, 918 F. 2d 145, 147 (11th Cir. 1990). The Court finds that Mr. Coulliette's actions did not violate clearly established law. Accordingly the Court finds in favor of Defendant Coulliette on Count I as against him personally.

Count I Against Defendants In Their Official Capacities

Defendants allege that under the following theory, they are not proper 42 U.S.C. 1983 defendants: (1) because they are being sued in their official capacities, Plaintiffs are actually suing the state and (2) states are not proper Defendants under 42 U.S.C 1983, Defendants are incorrect. Individual suits that seek prospective relief for ongoing violations of federal law may be levied against state officials, Ex Parte Young, 209 U.S. 123, 159-60 (1908); Will v. Michigan Department of State Police, 491 U.S. 58, 71 Fn 10 (1989); Tennant v. Florida, 111 F. Supp. 2d 1326, 1330 (2000). For this reason, the Court finds against Defendants on Count I as against them in their official capacities.

Plaintiffs' Motion for Summary Judgment

Introduction

Plaintiffs seek three permanent injunctions. They ask that Defendants, and anyone acting in concert with defendants, be permanently enjoined: (1) from preventing, or interfering with., free speech activities within the John D. MacArthur Beach State Park which include innocent, non-erotic nudity; (2) from seeking to enforce Florida Administrative Code 62D-2.014(7)(b) as a reasonable manner restriction to free speech activities within the Park; and (3) from seeking to utilize Florida Administrative Code 62D-2-.014(l8) to promulgate ad hoc time, place or manner restrictions without a narrowly tailored set of standards or guidelines. Plaintiffs also seek declaratory relief consistent with the proposed injunctions.

Plaintiffs' bring both facial and as applied challenges to the park, restrictions. at issue in this suit. The Court

ruled in Plaintiffs favor on their prayer "for injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003," (Pls. Compl. Par. (43)(a)). Federal Rule of Civil Procedure 65(d) requires each preliminary injunction to "be specific in terms." The Court's Order granting Plaintiffs' motion prevented Defendants from preventing or interfering with Plaintiffs' February 14, 2003 temporary art installation. The preliminary injunction has since expired on its own terms. Consequently, in evaluating the prayer for injunctive and declaratory relief in Plaintiffs' Motion for Summary Judgment, the Court will do so based solely on Plaintiffs," facial challenge. fn3

Because the Court has already resolved the case against Coulliette in his individual capacity, the part of Plaintiffs' motion seeking monetary damages against Coulliette will not be addressed.

Standard for a Permanent Injunction

"The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success," Siegel v. Lepore, 234 F.3d 1163, 1213 (11th Cir. 2000)(internal citations omitted). The moving party must demonstrate (1) actual success on the merits; (2) that continuing irreparable injury will be suffered unless the injunction issues-, (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the

opposing party; and (4) that, if issued, the Injunction would not be adverse to the public interest, Siegel v. LePore, 234 F.3d 1163 1176 (11th Cir. 2000); McDonald's Corp, v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998), In addition, plaintiffs must "demonstrate the presence of two elements: continuing irreparable injury if the injunction does not issue, and the lack of an adequate remedy at law, Newman v. State of Ala., 683 F.2d 1312, 1319 (11th Cir. 1982). Because Plaintiffs are, unable to show actual success on the merits, the court will not address the other burdens that Plaintiffs' must satisfy in order to be awarded injunctive relief.

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Preventing or Interfering With, Free Speech Activities Within the John D. MacArthur Beach State Park Which Include Innocent, Non-erotic Nudity

Expressive endeavors involving nudity as part of their expression such as the musical Hair have been accorded First Amendment protection. Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546, 550, 557-558 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 923(1975). That said, Supreme Court case law makes clear that even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. Ward v. Rock Against Racism, 491. U S, 781, 791 (1989); Clark v Community for Creative Non-

violence, 468 U.S. 288, 293 (1984); Heffron v. International Society of Krishna Consciousness, Inc., 452 U.S 640, 648 (1981). Because Defendants and anyone acting in concert with Defendants are constitutionally allowed to prevent or interfere with free speech activities of any type in the Park so long as the above test is met, the Court cannot enjoin Defendants completely from interfering with free speech activities that include nudity. The Court denies Plaintiffs' request that it promulgate such an injunction. For the same reasons, the Court is unable to grant declaratory relief consistent with said proposed injunction.

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Seeking to Enforce Florida Administrative Code 62D-2.014(7)(b) as a Reasonable Manner Restriction to Free Speech Activities Within the Park

In U.S. v. O'Brien, 391 U.S. 367 (1969), the Supreme Court upheld a statute criminalizing the mutilation, destruction or burning of selective service certificates or draft cards. In that case, Mr. O'Brien was charged with violation of said statute after burning his draft card on the steps of (the South Boston Courthouse in an attempt to publicly "influence others to adopt his antiwar beliefs." U.S. v. O'Brien, 391 U.S. 367, 370 (1968). In O'Brien, the Supreme Court reiterated its position that when speech and nonspeech elements are "combined in the same course of conduct, a sufficiently important governmental interest in regulating non-speech element can justify incidental limitations on First Amendment freedoms." Id. at 377. The Court then

held the statute constitutional under the subsequently named O'Brien test because: (1) it was within the constitutional power of the government; (2) it furthered an important or substantial governmental interest; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged first Amendment freedoms was no greater than essential to the furtherance of that interest. Id. at 377-378. The O'Brien test has been applied in many situations by the Supreme Court. Twice, it has been applied to upholds bans on public nudity because "Being 'in a state of nudity' is not an inherently expressive condition." City of Erie v. Pap's, 529 U,S. 277, 289 (2000).

In Barnes v. Glen Theatre Inc., (501 US. 560 (1991) and in City of Erie v. Paps, U.S. 277(2000)' the Supreme Court upheld statutes banning public nudity. In both cases, the nudity in issue was erotic nude dancing in private dancing establishments, in Barnes, Chief Justice Rehnquist, joined by Justice O'Connor and Justice Kennedy agreed that nude erotic dancing was expressive conduct within the outer perimeters of the First Amendment. Barnes, 501 U.S. at 566. In their plurality opinion, they applied the O'Brien test and determined that the statute was justified in spite of its incidental limitations on some expressive activity, including nude dancing. Id. at 566-572. They found that the law furthered a substantial governmental interest in protecting societal order and morality. Id. Justice Scalia, in a concurring opinion, concluded the law was constitutional because as a general law regulating conduct and not specifically directed at expression, it should be evaluated under rational basis scrutiny. Id. at 572. Under such minimal scrutiny, he found that moral

opposition to nudity was a rational basis for its ban. Id at 580. In another concurring opinion, Justice Souter found that the statute passed the O'Brien test because of the State's interest in preventing the secondary effects of adult entertainment establishments including such nefarious activity as prostitution, sexual assault and associated crimes. Id. at 581-587. Because the Court did not gather a majority, no definitive rule was established to provide guidance for local legislators and lower court judges with regard to the issue of public nudity statutes.

In 2000, the Supreme Court was again squarely presented with a statute banning public nudity. In City of Erie, the operator of Kandyland, an establishment featuring nude, erotic dancing, challenged a public indecency statute Proscribing nudity in public places. City of Erie v. Pap's A.M., 259 US, 277 (2000). The statute was virtually identical to that in Barnes. Id. at 289. Moreover, its preamble suggested that its actual purpose was to combat the, negative secondary effects associated with erotic dancing. Id. at 292. Once again, in City of Eric, the Supreme Court was unable to gather a majority, although it did come closer. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, concluded that the government restrictions on public nudity should be evaluated under O'Brien because the justification for the rule was unrelated to the "suppression of expression," making it content neutral, Id. at 292. Under O'Brien, the plurality held, just as Justice Souter had in Barnes, that the governmental interest in combating the harmful secondary effects associated with nude dancing were sufficient to tender the statute constitutional as applied. The Justices further asserted that even though requiring dancers "to wear pasties and G-strings may

not greatly reduce these secondary such effects," Id. at 301.

Justice Scalia, with whom Justice Thomas joined, wrote an opinion concurring in the judgment. He maintained that the Supreme Court could not sustain a constitutional challenge because the case was moot, Id. at 302. He did, however, address the merits briefly. He reiterated that the statute should be upheld "not because it survives some lower level of First Amendment scrutiny, but because as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all." Id. at 307-308(internal citations omitted). Justice Scalia also made clear that even if the statute was not a general ban on nudity, but specifically targeted nude dancing, he would not find it problematic so long as the conduct was not prohibited precisely because of its communicative attributes. Id. at 310. He wrote, it is the "traditional power of government to foster good morals (bonos mores) and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing itself is immoral, have not been repealed by the First Amendment," Id. at 311.
Because the Supreme Court did not garner a majority in either Barnes or City of Erie, lower Courts such as this one are left to puzzle through cases regarding bans on public, nudity, unsure specifically how to address them. This Court is inclined to agree with Scalia that a general law regulating conduct should sustain unconstitutional challenge not if it survives O'Brien scrutiny, but if a rational basis can be articulated for its existence. Rule 62D-2.014(7)(b), by its terms regulates conduct alone. fn4 It bans all activities involving nudity in "every area of a park including bathing areas,

"regardless o whether that nudity is accompanied by expressive activity, FLA. Admin. Code ANN. r. 62D-2.014(7)(b). There is no indication or allegation by either party that the rule on its face is specifically directed at expression, Maintenance of Florida parks and protection of the experience of the visiting public is a rational basis for a general ban on nudity in parks. Moreover, the traditional police power of the States is defined as "the authority to provide for the public health, safety, and morals of its citizens. Barnes, 501 U.S. 560, 569 (191)(Scalia, concurring). Whether or not this Court agrees with such views,fn5 our society has traditionally treated as morally suspect any activities Involving either erotic or nonerotic nudity. Id. at 575. Governments have thus regulated such behaviors under their police powers. In spite of the Court's distrust of such morality based regulations, they certainly amount to a rational basis for a general ban on nudity ill state parks. Evaluated under Justice Scalia's analysis of general bans on nudity, the Court would find against Plaintiffs.

Justice Scalia's analysis was not the majority or even plurality opinion in either Barnes or City of Erie. Moreover, in Fly Fish. Inc. v. City of Cocoa Beach, 337 F. 3d 1301 (11th Cir. 2003), the Eleventh Circuit applied an intermediate level of First Amendment scrutiny in analyzing the constitutionality of a city's adult entertainment ordinance. The Court will thus proceed to analyze Rule 62D-2.014(7)(b) using the O'Brien test as utilized in City of Erie.

As discussed previously, Rule 62D-2.014(7)(b), by its terms regulates conduct alone. Even though this regulation has an incidental effect on some speakers or

messages, such as those delivered by Plaintiffs, it is content neutral because it can be justified without reference to the content of the expression. City of Erie, 529 U.S. at 294 (2000). Because the Court finds that the DEP "'has a significant interest in keeping the entire park open to all visitors during operating hours," and that nudity would so prevent, we find Rule 62D-2-014(7)(b) to be content neutral on its face,fn6 (Pls.'s Exh. 4).

Because the Rule is content neutral, "only the `less stringent' standard from O'Brien for evaluating restrictions on symbolic speech is employed," City of Erie, 529 U.S. at 289 (2000). The O'Brien test requires that the regulation (1) be within the government's constitutional power to enact; (2) further a substantial or important government interest; (3) be unrelated to the suppression of free expression; and (4) be no greater than is essential to further the government interest. Id. First, it is clearly within the state's police powers to protect "the safety or recreational experience of the visiting public" and "'the natural or cultural value of the park." FLA. ADMIN. CODE ANN. r. 62D-2.014(1). Second, the regulation furthers the important and substantial government interest stated, above. It prevents the preemption of clothed bathers, from, using, the park, protects the public from the "offense" of nudity, and preserves park aesthetics so that the "entire park is open to all visitors during operating hours." (Pls. Exh. 4), As discussed above, the regulation is content neutral and thus satisfies the third prong of the O'Brien test.

Finally, the Court finds that Rule 62D-2.014(7)(b)'s ban on nudity is no greater than is essential to further the

government interest, described above.fn7 In the past, Defendants allowed for nudity coupled with expressive conduct in the Park provided the participants stayed behind a screen separating them from other park visitors. Park authorities were, however, unable to ensure that those engaged in the expressive conduct stayed behind the screen. Defendants thus argue that a complete ban on nudity is necessary, The Court agrees. Moreover, just as Justice O'Connor wrote so eloquently about pasties in City of Erie, even if the public nudity ban has some minimal effect on the message of any expressive conduct "by muting that portion of the expression that occurs when the last stitch is dropped,'" those engaged in expressive conduct at the park are free to continue with their conduct wearing thong bathing suits. City of Erie, 259 U.S. at 294 (2000). "Any effect on the overall. expression is de minimis." Id. The Court finds that Rule 62D-.014(7)(b) prohibiting nudity is no greater than is essential to shield people from the offense of nudity and to protect the experiences of the visiting public. Because Rule 62D-2.014(7)(b) passes the O'Brien test, Plaintiffs' facial challenge cannot prevail. The Court denies Plaintiffs' request that it enjoin the Rule's use. It also denies Plaintiffs' request for declaratory relief regarding the use of Rule 62 D-2.014(7)(b),

Plaintiffs' Request That the Court Permanently Enjoin Defendants, and Anyone Acting In Concert With Defendants, From Seeking to Utilize Florida Administrative Code 62D-2-014(18) to Promulgate Ad Hoc Time, Place or Manner Restrictions Without a Narrowly Tailored Set of Standards or Guidelines

The Court now turns to the facial constitutionality of

Rule 62D-2.014(18) and finds it not to be an unconstitutional restriction on free speech. First, the rule does not operate as a prior restraint on speech. "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs, U.S. v. Frandsen, 212 E 3d 1231, 1238-39 (11th Cir. 2000). Under the Park's rule, a park visitor need not obtain a permit or license prior to engaging in expressive activity. The Rule therefore does not operate as a prior restraint.

As stated previously, even in a public forum, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided they are content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information, Ward, 491 U.S. at 791 (1989), The Court now evaluates Rule 62D-2.014(18) under the Ward standard.

First, the rule is content neutral if the government has not adopted it in order to prevent speech due to disagreement with the message that speech conveys. In this case, the Rule is permissive and operates to allow persons engaging in free speech activities to determine what time, place, and manner restrictions may apply in any particular situation by contacting the park manager. FLA, ADMN. Code ANN. r. 62D-2.014(18). It operates primarily to prevent free speech activities from creating a safety hazard or interfering with any other park visitor's enjoyment of the park's natural or cultural experience." FLA. ADMIN, CODE ANN. r. 62D-2.014(18) Because Rule 62D-2.014(18) is concerned not with the content of the free speech activity

involved, but rather with the operation of the parks, it is content neutral, Moreover, the Court finds the government's interest in running the parks and protecting the safety and enjoyment of the park's visitors to be a significant government interest. See Clark v. Community ,for Creative Non- Violence, 468 U.S. 288, 296 (1984). A content-neutral time, place, and manner restriction that serves a legitimate government interest need not be the least restrictive available. Ward, 491 U.S. at 798-99 (1985). The Court interprets the Rule's language to be limited to applying time, place, and manner restrictions to free speech activities that "create a safety hazard or interfere with. any other park visitor's enjoyment of the park's natural or cultural experience." FLA. ADMIN. CODE- ANN. r. 62D-2.014(i), See Frandsen v Department of Environmental Protection, 829 So. 2d 267, 271 (Fla. 1st DCA 2002), It is thus narrowly tailored, and leaves open ample alternatives for communication. Plaintiffs argue that the regulation gives park managers unfettered discretion in setting restrictions on protected First Amendment activities, and thus is unconstitutional. In Thomas v. Chicago Park District, 534 U.S. 316 (2002), the Supreme Court held a content-neutral permit scheme to be permissible where denial of a permit could be based only upon specific and pre-determined reasons. In that case, Scalia cautioned "Of course even content-neutral time, place, and manner restriction can be applied in such a manner as to stifle free expression. Where, the licensing, official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content." Id. at 323. Plaintiffs argue that such a risk is present here. Because the DEP rule in issue here is inapposite,

Plaintiffs are incorrect. Rule 62D2.014, unlike the regulation in Thomas, does not establish a permit system requiring narrow and specific standards. Rather, it is a permissive rule that operates as a warning that time, place, and manner restrictions may apply to free speech. The park manager has discretion to determine the suitability of place and manner, but he does not have discretion to prevent free speech activities. The Court therefore denies Plaintiffs' request to enjoin the use of Rule 62D-2.014(l8) and declines to grant declaratory relief regarding said rule.

This Motion for Summary Judgment has involved purely legal questions based on complete evidentiary records. Both parties have had an adequate opportunity to develop their arguments and adequate notice that the Court will rule in a dispositive manner. Under the Eleventh Circuit's ruling in Artistic Entertainment, Inc. v. City of Warner Robins, 331 F. 3d 1196 (11th Cir. 2003), it is therefore appropriate for the Court to grant summary judgment to Defendants on Count I of the Complaint as against them in their official capacities.

Plaintiffs were not successful in this case at the summary judgment stage. They were, however, successful at the preliminary injunction stage. Plaintiffs were therefore able to obtain the primary relief sought in their complaint, a preliminary injunction prohibiting state officials at the park from arresting Ms. Wyner or otherwise interfering with her temporary art installation on February 13, 2003.

Holmes said "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result

with all your heart you naturally express your wishes in law and sweep away all opposition." Abrams v. U.S., 250 U.S. 616, 630 (1919)(Holmes dissenting). The Court is wary of the oppressive actions which result due to the truth of Homes' words. The Court does not, however, find such oppression to be present in this case. Rule 62D-2.014(7)(b) and Rule 62D-2.014(18) are facially constitutional. It is the Court's cautionary hope that Plaintiffs and Defendants will strive to work together amicably in the future and that Plaintiffs will continue to utilize John D. MacArthur Park, albeit not in the nude.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Final Judgment (DE 45) is, GRANTED IN PART in so much as It applies to Count I as brought against Defendant Coulliette in his individual capacity, Plaintiffs' Motion for Summary Judgment (DE 55) is DENIED. DEFENDANTS are GRANTED Summary Judgment on Count I as brought against Defendant Scruhs and Defendant Coulliette in their official capacities, thus disposing of all remaining claims.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 28 day of January, 2004

Footnotes

Fn1 See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 ((1991)(Chief Justice Rehnquist for the Plurality). ("The traditional police power of the States is defined as the authority to provide for the public health safety, and

morals.

fn2As the Court made clear at the hearing on January 21, 2004, the driving force behind its decision was the testimony of Chief of Operations for the Florida Park Service, Peter Scalco that one of the factors used in determining whether or not to apply Rule 62D-2.014(7)(b) to Ms. Wyner's activity was that it was different from her other activities because it seemed "to be about a peace demonstration. " (Prelim. Injunc. Hearing at 61). From Mr. Scalco's testimony, the Court perceived the DEP to be applying the rules in a content-based and therefore unconstitutional manner,

fn3Plaintiffs argued before the Court on January 21, 2003, that their challenge is an as applied challenge because they are "questioning its application to expressive activity." (Calendar Call Transcript. at p.4). In the absence of any particular facts to which the regulations can be applied, however, the Court must treat Plaintiffs constitutional challenge as a facial one.

fn4As Judge Easterbrook sarcastically articulated in Miller v. Civil City of South Bend, 904 F. 2d 1081, 1120 (7th Cir. 1990), "Almost the entire domain of [the] statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech."
fn5As this Court has previously expressed, "The value of freedom is found not only in the larger issues of life but also in the fanciful and strange. Events like Fantasy Fest in Key West and the Mango Strut in Miami may not be to everyone's taste, but they add to the spice of life in South Florida that for the most part, we enjoy." Wyner v. Struhs, 254 F.Supp.2d 1297, 1303 (S.D. Fla. 2003).

fn6Justice Scalia succinctly described a content-neutral regulation of nudity in the following way: "One may not go nude in public, whether or not one intends thereby to convey a message, and similarly one may go nude in private, again whether or not that nudity is expressive." Barnes v. Glen Theatre, Inc, 501 US. 560, 575 fn3 (1991)(concurring).

fn7In Ward v, Rock Against Racism the Supreme Court held that "Least any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." Ward, 491 U.S. 791, 799 (1999). Although the Ward standard is different than that articulated in O'Brien, because the Supreme Court has applied them in very similar ways, it is instructive. As Professor Heidi Kitrosser states, "the Court effectively has collapsed them into one standard. The Court has done so, first, by explicitly stating that the two standards effectively are the same. Second, the Court has applied each came in a manner that ignores significant facial differences between the two standards. For example, while the O'Brien standard, on its face, makes the very strict demand that a content-neutral regulation be the least restrictive means of furthering the government's interest, the court has not applied the O'Brien test in nearly so strict a manner." From Marshall Mcluhan to Anthropomorphic Cows: Communicative Manner and Me First Amendment, 96 NWULR 1339,1371 (Summer 2002).

7/17/2006

No. 04-14750

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

T. A. WYNER, GEORGE SIMON,
Plaintiffs-Appellees,

Versus

DAVID B. STRUHS, in his official capacity as Secretary, Florida Department of Environmental Protection, TERENCE COULLITTE, individually and in his official capacity as Park Manager of the John D. MacArthur Beach State Park,
Defendants-Appellants.

On appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

JUDGES: Before EDMONDSON, Chief Judge, BARKETT, Circuit Judge, and HUNT, * District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 25, FRAP), the Petition(s) for Rehearing EN Banc are DENIED.

Footnote

* Honorable Willis B. Hunt, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.